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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 752

J. C. BRADFORD ET AL.,
Petitioners,

vs.

MRS. GUILBERTA DAKIN MAGGIORE ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Petitioners, Phillips & Buttorff Corporation, Church of Christ Foundation, Inc., First National Company and G. L. Comer, pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered for the Middle District of Tennessee in Docket No. 14,790, and remanding the cause for further proceedings in conformity with the opinion.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A hereto) has not yet been officially reported.

The findings of fact and conclusions of law (filed October 31, 1960) by District Judge Miller will be found in Brief and Appendix for Defendants-Appellees (U.S. Court of Appeals) pp. 1b-10b.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 4, 1962. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254.

QUESTIONS PRESENTED.

The several questions presented by this Petition are:

1. Whether the Circuit Court of Appeals for the Sixth Circuit, in its decision violated the mandatory requirements of the Act of Congress passed June 25, 1948, generally known as the "Rule of Decision" law, being 62 Stat. 944, 28 U.S.C.A. 1652, as construed by this Court in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (85 L. Ed. 327), by failing to consider and give effect to *Creighton, Trustee, v. Hayes et al.*, 209 Tenn. 364, decided and published by the Supreme Court of Tennessee after the decision of the District Court and pending the decisions on appeal in this cause.

2. Whether Rule 52 of the Federal Rules of Civil Procedure required the Circuit Court of Appeals to accept and approve the factual findings and conclusions of the District Judge (the case having been heard by the District

Judge without a jury); or whether, notwithstanding said Rule 52 and the decision of this Court in *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, the Circuit Court of Appeals was entitled to draw its own conclusions *de novo*.

FEDERAL STATUTE INVOLVED.

The Act of Congress, June 25, 1948, 62 Stat. 944, 28 U.S.C.A. 1652, is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

RULE INVOLVED.

So far as pertinent, Rule 52 (Federal Rules of Civil Procedure) is as follows:

> "Rule 52. Findings by the Court.
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* . . ."
>
> (Emphasis added.)

STATEMENT.

Phillips & Buttorff Corporation, hereinafter referred to as P & B, purchased for $2,700,000, which was at the rate of $45 a share, the controlling stock of Wm. R. Moore Dry Goods Company, herein referred to as Moore. P & B was engaged in the manufacturing and merchandising business and Moore in the merchandising business. P & B suffered substantial operating losses after this purchase, and rather than borrow funds by mortgaging its real estate, sold the Moore stock back to its majority stockholder from whom it had been purchased, at the same price of $45 per share, in order to replenish working capital. Meanwhile, non-resident minority stockholders had, without prior demand on the directors, brought a suit to rescind the transaction, basing federal jurisdiction on diversity of citizenship, and contending that the purchase of the Moore stock by P & B was at an excessive price and disadvantageous to P & B. After the sale of the Moore stock by P & B *without loss* Plaintiffs amended the complaint so as to seek to recover from the directors and majority stockholder the amount of P & B's operating losses and to have a receiver appointed.

After hearing oral testimony in open court of numerous witnesses for the defendants, without a jury, and hearing discovery depositions taken by plaintiffs, the District Court found the facts specially, stated separately its conclusions of law thereon, and directed the entry of judgment dismissing the complaint, as amended.

The Court of Appeals reversed and remanded the case and directed the District Court to consider, in the light of the opinion, the award of attorneys' fees to plaintiffs' attorneys, to be paid by the corporation, and a recovery for the benefit of the corporation of interest at the rate of 6% on $2,700,000 between the date the suit was commenced and

the date the Moore stock was sold, less the dividends paid on the Moore stock during this period.

In reversing the decision of the District Court, the Court of Appeals expressly sustained, as "not clearly erroneous," a finding of the District Court[1] that P & B's operating losses "were not attributable in whole or in part to the Moore purchase." But the Court of Appeals set aside the affirmative "good faith" finding of the District Judge and held that the Moore purchase was "prejudicial" to the corporation and minority stockholders (1) because P & B converted certain assets into cash and borrowed additional money to complete the purchase, and (2) because the proceeds of the sale were used by the majority stockholder to finance the purchase of the controlling interest in P & B. That being the case, the Court of Appeals characterized the transaction as involving "constructive fraud" and said that the persons participating had engaged in a "conspiracy" to do an "illegal" act. There was, however, no finding of fact by the Court of Appeals that the Moore purchase was intrinsically *unfair* or *disadvantageous* to P & B, *nor did the Court point out any error* whatever in the District Court's finding on this subject, which was as follows:[2]

> "9. The Moore purchase, at the time it was made, was advantageous to P & B for several reasons. The asset value of the stock was approximately $69 per share exclusive of leasehold improvements having a book value of approximately $4 per share. Approximately $26 a share of this amount represented valuable Memphis real estate. There was room for improvement in the earnings of Moore and its subsidiaries, based on the volume of sales, but on the basis of current earnings, the stock was fairly valued at $45 a

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1. Finding 6, Appellee's Appendix, 6b.

2. Appellee's Appendix, 8b.

share, bearing in mind the amount of real estate owned, on which a small return would be normal. Through this purchase the minority stockholders of P & B obtained needed diversification and P & B obtained outlets for its products through Moore's subsidiaries engaged in the wholesale and retail business. One of the subsidiaries, Keith-Simmons Co., Inc., is an important wholesale hardware company. The sale of the miscellaneous stocks and bonds was not a disadvantage to P & B. With the exception of the investment trust shares, these securities sold at a loss and would have declined further in value if they had been retained. The investment of funds of a manufacturing enterprise in investment trust shares was abnormal, requiring an investor in P & B stock to pay twice for investment advice. The opportunity to purchase 51% of the Moore stock from the owner of 99% was unusual, and was afforded to P & B because the Foundation had the option to acquire control of P & B. Weighing the advantages against any possible disadvantage to P & B, the Court finds as a fact that the transaction was both fair and advantageous to P & B and its minority stockholders. Although the market price of P & B stock declined substantially after the Moore purchase, this decline was not attributable to that transaction, but rather to the operating losses."

On the trial the Petitioners offered numerous witnesses who testified as to the various matters included in the above quoted finding No. 9. *Their testimony was undisputed.* Thus, the various facts set out in finding 9, and the *factual inferences* therefrom stand not only supported by the substantial testimony of the various witnesses observed by the trial judge; they stand *undisputed* by any substantial evidence; and there is no conflict in the evidence concerning them.

The Circuit Court of Appeals, however, gave no recognition to this posture of the record; rather, it *avoided*

consideration of finding 9. In its opinion it stated that "the controlling evidence was uncontroverted," and that it "remained only for the Court to determine the legal consequences". Thus, the Court regarded the fairness and advantageousness of the transaction as involved "legal consequences" rather than "factual inferences".

The Circuit Court of Appeals in its opinion said that "the controlling evidence was uncontroverted," and that it "remained only for the Court to determine the legal consequences." Thus the Court of Appeals regarded the fairness and advantageousness of the transaction as involving "legal consequences" rather than factual inferences. The Court of Appeals thereby avoided consideration of Finding 9 of the District Court.

REASONS FOR GRANTING WRIT.

1. A majority stockholder is not guilty of "constructive fraud" or of participating in a "conspiracy" to perform an "illegal" act, by engaging in a transaction with the corporation which is fair and advantageous to the corporation, even if it enables the majority stockholder to finance the purchase of the controlling stock of the corporation. Under Tennessee law, as declared by the State's highest court, a transaction between a corporation and its majority stockholder must be sustained if it is found to have been fair and advantageous to the corporation when it took place. (*Carrier* v. *Dixon*, 142 Tenn. 122) The case cited by the Court of Appeals, *Gillespie* v. *Brannam*, 47 Tenn. App. 234, was decided by an intermediate court and is not authoritative in a diversity case. *Citizens State Bank* v. *American Fire & Casualty Co.*, (5 Cir., 1952) 198 F.2d 57; *United States* v. *Norsam Realty Corp.*, (2 Cir., 1942) 125 F.2d 456; *Keehn* v. *Excess Ins. Co. of America*, (7 Cir., 1942)

129 F.2d 503. Moreover, in *Gillespie* v. *Branham*, the sole minority stockholder objected; in this case, a majority of the minority stockholders voted with the majority. (District Court's Finding 4)[3]

This being a case where federal jurisdiction rested solely and exclusively upon diversity of citizenship, it was mandatory that the law of Tennessee be applied under the Federal Statute hereinabove set out, and this mandatory requirement applies to decisions of the Supreme Court of Tennessee rendered *subsequently* to the decisions of the District Court and in full effect at the date of determination by the Circuit Court of Appeals. (*Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 85 L. Ed. 327); such a case was *Creighton, Trustee*, v. *Hayes et al.*, 209 Tenn. 364, decided February 8, 1961, after the decision of the District Court and decided and published before the decision of the Court of Appeals.

2. The Circuit Court of Appeals decision violates Rule 52 of the Federal Rules of Civil Procedure as construed by this Court in *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291, where it was held that the "clearly erroneous" rule "applies to factual inferences from undisputed basic facts." The Court of Appeals erred in treating as "legal consequences" what were actually "factual inferences." Factual inferences drawn by a District Court may not properly be disregarded by giving them a different name.

The Circuit Court of Appeals erred in reversing the decision without considering whether Finding 9 of the District Court was or was not "clearly erroneous" within Rule 52, and without giving "due regard to the opportunity

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3. Appellee's Appendix, 3b.

of the trial court to judge of the credibility of the witnesses" as the rule requires.

The Circuit Court of Appeals improperly substituted its view that the transaction was "prejudicial" and "illegal" for the District Court's finding of fact that it was "fair and advantageous." This Court should grant certiorari in a non-jury case where the trial judge's function in drawing inferences from proven facts has not been respected, for the same reason that it grants certiorari in jury cases where the jury function has not been respected. Cf. *Wilkerson* v. *McCarthy*, 336 U.S. 53.

3. The decision of the court below involves an important question of Federal law and procedure which the Court decided contrary to the decision of this Court (*Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291) and contrary to the applicable law of Tennessee as declared by its Supreme Court (*Creighton, Trustee*, v. *Hayes et al.*, 209 Tenn. 364) and procedural questions arising out of the interpretation of Rule 52 of the Federal Rules of Civil Procedure which the Court below decided contrary to its own previous decisions (*Tracy* v. *Finn Equipment Co.*, 290 F.2d at 498; *C.I.R.* v. *Spermacet Whaling & Shipping*, 281 F.2d 646; *Rich* v. *Pappas*, 299 F.2d 308).

4. A serious conflict in the construction and application of the Federal Rule of Decision Statute and the construction of Rule 52 of the Federal Rules of Civil Procedure exists among the various Circuit Courts of Appeal which ought to be settled by this Court, and which apparently the Circuit Courts of Appeal do not regard as having been settled by this Court in *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278. See, for example, decision in *C.I.R.* v. *Spermacet Whaling and Shipping*, 281 F.2d 646, at page 651. Quite recently, the Seventh Circuit, in *Pflugardt* v. *U. S.*, decided December 4th, 1962.

and not yet reported, called attention to the fact that the Seventh, Third and Fifth Circuits were in agreement, but that the Second Circuit took a contrary view in Austin v. C. I. R., 298 Fed. 2d 583, disagreeing with the Sixth Circuit.

CONCLUSION.

For the foregoing reasons this petition for the writ of certiorari should be granted.

Respectfully submitted,

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